THE HON'BLE Ms. JUSTICE G. ROHINI

WRIT PETITION NO.21711 OF 2005,
WRIT PETITION NO.21713 OF 2005,
AND
WRIT PETITION NO.21715 OF 2005,

DATED: 26TH SEPTEMBER, 2006.

Between :

Chandana Enterprises, Secunderabad,
Rep. by its Proprietor Smt. K. Jaya Lalitha. … Petitioner

And

1. Bharat Sanchar Nigam Limited, rep. through Its Deputy General Manager (Customer Service & Sales), O/o. Chief General Manager Telecom, A.P. Circle, 3rd floor, Door Sanchar Bhavan, Nampally Road, Hyderabad-01 and another. .. Respondents

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WRIT PETITION NO.21711 OF 2005,
WRIT PETITION NO.21713 OF 2005,
AND
WRIT PETITION NO.21715 OF 2005,

COMMON ORDER :

These three writ petitions are filed by one Chandana Enterprises, Secunderabad with a common prayer to declare that the action of the 1st respondent in not awarding franchiseeship for sale of BSNL services and products to the petitioner as arbitrary and illegal. Hence, all the writ petitions are heard together and decided by this common order.

The facts, in brief, are as under :

Bharat Sanchar Nigam Limited (BSNL), the respondent No.1 in all the writ petitions issued notice dated 8-4-2005 inviting sealed E.O.Is (Expression of Interest) for selection of franchisees for sale of BSNL services and products in A.P. circle from eligible parties in respect of several territories in different districts. The writ petitioner claims to be an authorised dealer of BSNL for marketing and distribution of cellular mobile services (postpaid) in the territories of Krishna, Chittoor, West Godavari, East Godavari, Guntur and Secunderabad apart from other prepaid cellular mobile services. In response to the notice dated 8-4-2005 published in local dailies inviting E.O.Is, the petitioner had submitted its bids for the territories viz., Tirupati-2 (Chittoor District), Tenali (Guntur District) and Rajampet (Kadapa District) within the time and dates specified in the notice. It is claimed that the petitioner had not only possessed the experience in the same field of electronic business having been working as the dealer and distributor of BSNL possessing all the required paraphernalia, but also satisfied the eligibility criteria as prescribed under the notice inviting EOI.

However, strangely, the 1st respondent has selected and

awarded the franchiseeship in favour of some other tenderers, in respect of the abovesaid three territories i.e, Tirupati-2, Tenali and Rajampet. It is alleged that the said franchisees who were selected (impleaded as respondent No.2 in the writ petitions) did not fulfill the eligibility criteria as prescribed under the notice inviting EOI. It is alleged that the franchisees who were selected were not possessing the experience in the electronic business and they also failed to produce the required documents to substantiate their eligibility. In spite of the same, the 1st respondent had accepted the defective tenders and selected them for awarding the franchiseeship to the petitioner. Hence, these three writ petitions seeking a declaration that the action of the 1st respondent is arbitrary and illegal and consequently to direct the 1st respondent to award the franchiseeship in respect of Tirupati-II, Tenali and Rajampet territories.

I have heard the learned Counsel for both the parties and perused the material on record.

The learned Counsel for the petitioners pointed out that the criteria for selection is based upon the number of marks obtained by the tenderer as provided under clause-4.32 of the tender document under which, 35 marks each have been allotted to experience, nature/field of business and size of the show-room (carpet area) and the remaining 30 marks have been allotted to turnover. It is contended by the learned Counsel that since the petitioner was working as the dealer and distributor of BSNL till the adoption of new policy of franchiseeship by the BSNL and had also been carrying on similar electronic business for the last more than 9 years possessing the show-rooms with required specifications, the respondent No.1 ought to have awarded full marks to the petitioner against all the three heads specified under the selection criteria. Thus, it is contended that the petitioner is entitled to 100 out of 100 marks and the petitioner being the best candidate among all the participants, there is absolutely no reason to award the franchiseeship to others in respect of the 3

territories in question.

In the counter-affidavit filed on behalf of the 1st respondent – BSNL, the allegations made by the petitioner have been denied and it is stated that the successful bidders in respect of the three territories in question have fully satisfied the prescribed eligibility criteria. The selection committee has taken into consideration all the conditions stipulated in the tender document and strictly followed the criteria of selection prescribed in the bid document. It is further stated that the selection committee consists of one Professor from ICFAI, one Professor from IPE (OU) and 4 Members from BSNL and that the petitioner was not selected by the selection committee as per the recommendations of the vigilance wing of A.P. Telecom Circle, Hyderabad.

In pursuance of the order of this Court, the learned Standing Counsel also placed before this Court the minutes of the tender evaluation committee meetings in respect of the three territories in question.

From the minutes dated 13-6-2005, it is found that so far as the franchiseeship in respect of Tirupati-II territory is concerned, out of the 12 bids received, the 2nd respondent and the writ petitioner scored equal marks of 100 each. To resolve the tie, the Tender Evaluation Committee had taken the turnover as criterion and it was found that the turnover of the writ petitioner was higher. Accordingly, the writ petitioner was selected as franchisee for Tirupati-II territory.

However, in view of the report of the vigilance section, which was made available subsequently, the Tender Evaluation Committee again met on 16-7-2005 and reviewed the recommendations made earlier in the light of the vigilance enquiry report. As noted above, the petitioner was an existing dealer and distributor of BSNL at Vijayawada and on the basis of certain complaints, investigation was carried out by the vigilance section on the alleged fraud done by the petitioner at Vijayawada and Triupati.

Having regard to the serious allegations of fraud against the petitioner involving heavy financial loss to the Department as revealed in the vigilance enquiry report, the Tender Evaluation Committee opined that awarding franchiseeship to the petitioner firm is not in the interest of the department and accordingly recommended that the bidders who secured next higher marks in Tenali and Tirupati-II territories shall be awarded the franchiseeship. Thus, the earlier recommendation dated 13-6-2005 stood modified. In pursuance thereof, the 2nd respondent in W.P.No.21711 of 2005 was awarded the franchiseeship of Tirupati-II territory.

W.P.No.21713 of 2005 relates to the franshieeship of Tenali territory under Guntur Telecom District. The minutes of the Tender Evaluation Committee Meeting, dated 9-6-2005 placed before this Court shows that so far as Tenali territory is concerned, 3 bids were examined and the petitioner who had scored 97 marks was selected as franchisee for Tenali territory. However, after receiving the vigilance report dated 7-6-2005, the Tender Evaluation Committee again met on 16-7-2005 and taking into consideration the serious allegations of fraud against the writ petitioner as reflected in the vigilance enquiry report opined that the bidder who secured next higher marks shall be awarded the franchiseeship. Accordingly, the earlier recommendation dated 9-6-2005 stood modified and the franchiseeship was awarded in favour of the 2nd respondent in W.P.No.21713 of 2005.

So far as W.P.No.21715 of 2005 is concerned, the same was filed aggrieved by granting of franchiseeship of Rajampet territory under Kadapa Telecom District in favour of the 2nd respondent therein. The minutes of the Tender Evaluation Committee dated 7-6-2005 in respect of Rajampet territory shows that the bid of the petitioner bearing No.65/304 was not considered at all since the petitioner was disqualified on the ground that the Form-I submitted by it was found to

be incomplete. After evaluating the other valid bids received, the respondent No.2 in W.P.No.21715 of 2005 who scored the highest marks of 91 was selected as franchisee of Rajampet territory.

From the above, it is clear that so far as Rajampet territory is concerned, the petitioner was found to be a disqualified bidder on evaluation of the bids and therefore the petitioner was rightly eliminated from the selection process. In the absence of any plea or material to show that the action of the respondent No.1 in disqualifying the petitioner at the threshold was illegal or irregular, there is no reason for this Court to interfere with the franchiseeship awarded in favour of the 2nd respondent in W.P.No.21715 of 2005. The learned Counsel for the petitioner also does not dispute the same.

However, so far as W.P.Nos.21711 and 21713 of 2005 are concerned, since it is clear from the minutes of the Tender Evaluation Committee that the petitioner who scored highest marks was excluded from consideration on the ground of the adverse report submitted by the vigilance section, the learned Counsel for the petitioner vehemently contended that the action of the 1st respondent in relying upon the vigilance report on the basis of an enquiry conducted behind the back of the petitioner is arbitrary, illegal and violative of principles of natural justice. The learned Counsel contended that even assuming that the said vigilance report is valid, the said report which relates to the allegations of default by the postpaid subscribers in Vijayawada and Tirupati territories which also contained several contradictory findings cannot be made the basis to assess the past performance of the petitioner.

The learned Counsel pointed out that as a matter of fact the police who have investigated into the allegations of fraud in Vijayawada filed a charge-sheet in the Court of the Metropolitan Magistrate on 22-3-2005 in which one Parchuri Yadagiri Narasimha Rao was alleged to have cheated the BSNL as well as the writ petitioner which itself shows that there is no material to hold the

petitioner responsible for the alleged loss of revenue to BSNL. The learned Counsel also contended that at any rate the 1st respondent having selected the petitioner in the first instance in the meeting of the Tender Evaluation Committee, cannot reconsider the issue and modify the earlier decision unilaterally.

On the other hand, the learned Counsel appearing for the 1st respondent as well as the Counsel for the 2nd respondent contended that it is always open to the 1st respondent to take into consideration the performance record of the participants while finalising the bids and the action of the 1st respondent in not awarding the franchiseeship to the petitioner, in the particular facts and circumstances of the case cannot be held to be either arbitrary or illegal.

It is true that the 1st respondent which is an organization of the Union of India cannot act arbitrarily in the matter of grant of largess and it is expected to exercise its discretion in conformity with the norms which are not arbitrary, irrational or irrelevant. However, the law is also well settled that no person has a fundamental right to insist that the Government should enter into a contract with him and the lowest/highest bidder cannot claim any vested right to the award of contract though he is entitled to claim that his bid should be considered fairly and properly satisfying the equality clause under Article 14 of the Constitution of India.

As held by the Supreme Court in ASIA FOUNDATION & CONSTRUCTION LTD. v. TRAFALGAR[1] though the judicial review cannot be denied so far as exercise of contractual powers of government bodies are concerned, but it is intended to prevent arbitrariness or favouritism and it is exercised in the larger public interest or if it is brought to the notice of the court that in the matter of award of a contract power has been exercised for any collateral purpose.

In the case on hand, though the 1st respondent did not dispute

the fact that the petitioner scored highest marks so far as Tirupati-II and Tenali territories are concerned (subject-matter of W.P.Nos.21711 & 21713 of 2005), the record placed before this Court reveals that the petitioner was excluded and the franchiseeship was awarded to the bidder who scored next higher marks on the basis of the performance record of the petitioner while executing the very same work with the 1st respondent during the previous years. The report of the vigilance section dated 7-6-2005 on the fraud done by the petitioner at Vijayawada and Tirupati has been placed before this Court and the relevant observations made by the vigilance officer may be extracted hereunder :

"OBSERVATIONS :

On the report of provision of Connections by BSNL at Vijyawada:-

58 connections under 4 Groups were activated by BSNL. The applications received through one Sri Venkat, an agent of M/s. Chandana Enterprises, were processed, duly verifying the xerox copies/Registration Certificates etc., and the SIM cards were also handed over to the Agent. On receipt of the information of heavy usage, the addresses of the subs have been got verified and it was found no such persons are available. A Police complaint was lodged by the Nodal Officer on the said Venkat and he confessed having manipulated the applications. An amount of Rs.891,845/- was outstanding because of the fraud. Sri M.V. Narayana Rao, JTO, Cell One, scrutinized the applications before activation. Sri S. M. Basha, SDE, (the Nodal Officer) took action to activate the connections.

… … ….. …. ….. ……. ……

It is not out of place to mention here that the same dealer had indiscriminately sold the Recharge Coupons in bulk which found their way into the hands of unscrupulous elements for illegal termination of international calls in Hyderabad.

The said dealer is nurturing an ambition to be the most important person in BSNL, A.P., and unfortunately already gained a "Most favoured Dealer" status in the

minds of many of the functionaries. May be it is out of the large-scale business he has done during the last one year or so. But the instances discussed above reveal that the activities of his own 'agents' and in some cases he is not interested in setting up the establishment at all. In an important and strategic center like Vijayawada, his agent happened to be person of dubious character. The dealer time and again expresses critical remarks regarding the management/business strategies of BSNL and is more vocal in these issues rather than concentrating on his own establishments. He went to the extent of saying that even though 'Mr. Venkat' was employed by him, he is a member of BSNL workforce and as such the BSNL is responsible for his acts of commissions and omissions. This shows his poor interpretation of the words and phrases and also discloses a latent viewpoint that he is not at all responsible for anything related to his own workforce.

Under these circumstances, it is pertinent to examine whether such a dealer can be given the status of 'Channel Partner', if already given should be continued or not. On a dispassionate count, it should be mentioned that continuation of M/s. Chandana Enterprises as Channel Partner does not augur well for the BSNL and it is not in the best interest of BSNL."

Thus, it is clear that there was sufficient material before the 1st respondent for arriving at a conclusion that it is not desirable to award the franchiseeship in favour of the writ petitioner.

In the light of the existing circumstances, which revealed that the petitioner was facing various allegations of fraud, the Tender Evaluation Committee was justified in reconsidering the recommendation made in its earlier meeting. The record shows that on the basis of the earlier recommendation of the Tender Evaluation Committee, no decision as such was taken by the 1st respondent and in the meanwhile having regard to the nature of the serious allegations found from the report of the vigilance section, the Committee again met and modified the earlier recommendations with regard to Tirupati-II

and Tenali territories. Such action of the Tender Evaluation Committee in the absence of any allegation of malice against any member of the Evaluation Committee or any of the officials of the 1st respondent cannot be held to be vitiated on account of any mala fides or favouritism. As observed by the Supreme Court in PATNA REGIONAL DEV. AUTHY. v. RASHTRIYA PARIYOJANA NIRMAN NIGAM[2] the performance record of the tenderer while executing previous contracts is relevant in deciding whether to award the contract in his favour or not. Such consideration cannot be said to be either arbitrary or unreasonable. Hence, the decision of the 1st respondent to award the franchiseeship in respect of Tirupati-II and Tenali territories in favour of the bidders who scored next highest marks cannot be held to be on the basis of irrelevant factors.

Though the learned counsel for the petitioner while placing reliance upon the decisions of R.D. SHETTY v. INTERNATIONAL AIRPORT AUTHORITY[3], G.J. FERNANDEZ v. STATE OF KARNATAKA[4] and PODDAR STEEL CORPN. v. GANESH ENGINEERING WORKS[5] contended that the action of the 1st respondent in excluding the case of the petitioner from consideration was totally irrational and that would amount to relaxation of standard of eligibility prescribed under the tender notice, I am unable to agree.

As noted above, the validity of the decision of the tender committee is required to be examined having regard to the existing circumstances at the time when the decision is taken and the question whether the judicial review in the contractual jurisdiction is warranted or not has to be examined basing on the peculiar facts and circumstances of each case.

The facts in the instant case are entirely different from the context under which the ratio was laid down in the decisions cited by the learned Counsel for the petitioner. On examining the facts and

circumstances in the case on hand, it cannot be held that the discretion exercised by the 1st respondent was for any collateral purpose, much less arbitrary. As expressed above, the rejection of the petitioner's case so far as Tirupati-II and Tenali territories are concerned, was for valid reasons and therefore the interference by this Court under Article 226 of the Constitution of India is unwarranted.

Accordingly, all the three writ petitions are dismissed. No costs.

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G. ROHINI, J.

Dt. 26–09-2006

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[1] (1997) 1 Supreme Court Cases 738

[2] (1996) 4 Supreme Court Cases 529

[3] (1979) 3 Supreme Court Cases 489

[4] (1990) 2 Supreme Court Cases 488

[5] AIR 1991 Supreme Court 1579